7-6-1976

Milton Ray, Jr. v. Commonwealth of Kentucky

Appellant's Brief 1976-SC-0445

APPELLANT'S BRIEF

3856

550 SW 2d 482

SUPREME COURT OF KENTUCKY

FILE NO. 76-~~37~~ 445

MILTON RAY, JR. — APPELLANT

VS. — APPEAL FROM WASHINGTON CIRCUIT COURT
HON. ROBERT M. SPRAGENS, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief For Appellant has been mailed, postage prepaid, to Hon. Robert M. Spragens, Judge, Washington Circuit Court, Washington County Courthouse, Springfield, Kentucky 40069; Hon. Barry Bertram, Commonwealth Attorney, 11th Judicial District, Campbellsville, Kentucky 42718; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 6th day of July, 1976.

J. Vincent Aprile II

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VS. APPEAL FROM WASHINGTON CIRCUIT COURT
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COMMONWEALTH OF KENTUCKY APPELLEE

* *

MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTIONS PRESENTED

I.

DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DEPRIVE HIM OF DUE PROCESS OF LAW BY FAILING TO CONDUCT AN EVIDENTIARY HEARING OUT OF THE PRESENCE OF THE JURY TO ASCERTAIN WHETHER AN IN-COURT IDENTIFICATION OF APPELLANT BY THE ROBBERY VICTIM WAS INADMISSIBLE SINCE THAT IDENTIFICATION WAS TAINTED BY THE IMPROPER AND UNDULY SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURES.

II.

DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENY APPELLANT DUE PROCESS OF LAW BY OVERRULING APPELLANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL?

III.

WAS APPELLANT DENIED DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT BY THE TRIAL COURT'S IMPROPER INSTRUCTION ON THE LAW OF COMPLICITY LIABILITY?

STATEMENT OF THE CASE

On November 10, 1975, appellant and James K. Downs were indicted for two counts of robbery in the first degree and one count of assault in the third degree (Transcript of Record, hereinafter designated T.R., p. 4). According to Count I of the indictment, appellant and his co-defendant "on or about the 26 [sic] day of September, 1975, . . . robbed and physically injured Iveta Sprowles" (T.R., p.4). Count II of the indictment charged that the two defendants on that same day "robbed Springfield Liquors . . . and in so doing physically injured Iveta Sprowles" (T.R., p. 4). Count III of the indictment alleged that the defendants on that same day "intentionally caused physical injury to Iveta Sprowles" (T.R., p. 4).

Appellant was furnished with court-appointed counsel, John S. Smith, on November 10, 1975, and waived his right to a speedy trial on that day (T.R., pp. 5-6).

Although the record is less than clear on this point, it appears that appellant was tried on only Count II of the indictment which alleged a robbery of Springfield Liquors effectuated by a physical injury to Iveta Sprowles (T.R., p. 4). After trial on February 27, 1976, the trial court, on motion of the Commonwealth, dismissed Counts I and III of the indictment on the basis that those two counts had merged into the offense alleged in Count II (T.R., p. 24).

Contrary to his plea, appellant on February 20, 1976, was convicted of one count of first-degree robbery and sentenced to imprisonment for twenty years (T.R., pp. 15-17). On February 24, 1976, appellant filed a motion for a new trial (T.R., pp. 18-19), but the trial court overruled the motion that same day (T.R., p. 22). Judgment was entered in

appellant's case on February 24, 1976 (T.R., pp. 20-21). Notice of Appeal was filed on February 24, 1976 (T.R., p. 23).

Prior to trial, the prosecutor and the defense counsel stipulated that the pretrial identification of appellant by Mrs. Iveta Sprowles, the victim of the alleged robbery, was illegal and that any evidence obtained through that identification would not be admissible at trial (Transcript of Evidence, hereinafter designated T.E., pp. 2-3). Appellant's counsel then moved "to suppress the introduction of any evidence by Mrs. Iveta Sprowles as to the identity" of appellant, alleging that "her present identification" would be "tainted" by the previous impermissible identification (T.E., p. 3). Without conducting a hearing, the trial judge immediately overruled that motion (T.E., p. 3). The trial court stated that appellant's counsel could renew his motion after Mrs. Sprowles testified (T.E., p. 4).

In an effort to prove his case, the prosecutor called Mrs. Sprowles as his first witness (T.E., p. 5). She testified that on September 26, 1975, three black men entered the liquor store where she was working. Calling appellant by name, Mrs. Sprowles noted that "Mr. Ray" was the leader (T.E., p. 6). The witness testified that appellant bought some beer and another man bought an item off the potato chip rack (T.E., pp. 6-7). Mrs. Sprowles stated that appellant then asked the third man if he would like some liquor or something and that man stated that he wanted some chewing gum (T.E., p. 7). Mrs. Sprowles related that as she turned around to lay the gum on the counter, "lights went out" (T.E., p. 7). Upon regaining consciousness, she observed that her nose was bleeding and that personal items and money belonging to her as well as money in the cash register were missing (T.E., pp. 10-12).

The witness indicated that appellant was the man who bought beer prior to the theft (T.E., pp. 9-10), but stated that he was not the man who hit her (T.E., p.12).

On cross-examination, Mrs. Sprowles stated in response to a request for a detailed description of the three men that "Mr. Ray . . . was very tall" (T.E., pp. 18-19); she also noted that he wore a jacket (T.E., p. 19). Recalling the initial description she gave the police of the three men who were in the liquor store immediately prior to the robbery, Mrs. Sprowles noted that the one man, whom she later said was appellant, was merely "extremely tall" or "excessively tall" (T.E., pp. 31-32). She added that the three men were in the store "maybe five minutes" (T.E., p. 33).

At that point, appellant's counsel renewed his motion to exclude any evidence of identification of appellant by Mrs. Sprowles; the judge promptly overruled the motion (T.E., p. 34). Appellant's counsel then questioned the witness about her pretrial identification of appellant (T.E., p. 35). She related that on November 1, 1975, she identified appellant as the tall man in the store at the time of the robbery after she had viewed him, through a crack in the door at the police station, standing alone in another room (T.E., pp. 36-38). Mrs. Sprowles also admitted that she had been informed before she came to the station that the police had arrested a tall, black man (T.E., p. 41). Appellant's counsel then elicited from the witness that she saw appellant again at the preliminary hearing (T.E., pp. 41-42).

Tommy Smith testified for the prosecution that on November 1, 1975, appellant stated to him that he was cutting tobacco for Mr. Hourigan on the day in question (T.E., pp. 49-50). Mr. Smith's statement revealed that appellant was at Mr. Hourigan's late on September 26, 1975, but that no tobacco was cut on that day (T.E., p. 50). On cross-examination,

the witness admitted that there was no shred of evidence to link appellant with the robbery except for Mrs. Sprowles' description (T.E., p. 57).

At the close of the prosecution's case, appellant moved for a directed verdict; the trial court overruled appellant's motion (T.E., p. 59). The trial concluded with closing arguments by appellant's counsel and the prosecutor (T.E., p. 60).

ARGUMENT

I.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DEPRIVED HIM OF DUE PROCESS OF LAW BY FAILING TO CONDUCT AN EVIDENTIARY HEARING OUT OF THE PRESENCE OF THE JURY TO ASCERTAIN WHETHER AN IN-COURT IDENTIFICATION OF APPELLANT BY THE ROBBERY VICTIM WAS INADMISSIBLE SINCE THAT IDENTIFICATION WAS TAINTED BY THE IMPROPER AND UNDULY SUGGESTIVE PRE-TRIAL IDENTIFICATION PROCEDURES.

Immediately prior to trial, appellant's counsel and the Commonwealth Attorney stipulated that the pre-trial identification of appellant by Mrs. Sprowles was "illegally made" and that "any evidence obtained through such identification in said line-up would not be admissible" (T.E., pp. 2-3). Appellant's counsel then made the following motion:

> Comes the Defendant and moves the Court to suppress the introduction of any evidence by Mrs. Iveta Sprowles as to the identity of the Defendant, Milton Ray, by virtue of the fact that her present identification is tainted by an illegal line-up identification made by her on approximately November 1, 1975. The record should show that the Commonwealth agrees that that pre-arrest identification was illegal and improper. It should further be suppressed because the initial illegal and improper identification was further reenforced by a subsequent identification of the Defendant at a preliminary hearing, all of this based upon the sixth amendment and the fourth and fourteenth amendments, the right to due process, and then we cite to the Court United States v. Wade and Wong Sun v. United States. United States v. Wade is 388 U.S. 218 (1967) (T.E., p. 3).

Without conducting an evidentiary hearing, the trial court immediately overruled the motion to suppress the identification of appellant by Mrs. Sprowles (T.E., p. 3). The judge stated that he would "have to see what the testimony is" (T.E., p. 4). He further explained:

> I say, it depends upon the direct testimony as to whether or not what she testifies to here this morning on the trial of the case is sufficient in itself to meet the burden which is on the Commonwealt. Without any evidence of her having based her identification today upon these illegal procedures which were followed during the pre-arrest period. So, for that reason, at this time I will have to overrule. After her testimony, you may renew your motion and, if the Court at that time overrules it then you will, as you say, have to go into it to make your record. I agree (T.E., p. 4).

The only evidence which implicated appellant in the alleged offense was the testimony of Mrs. Iveta Sprowles, the alleged robbery victim. Although Mrs. Sprowles, a co-owner of Springfield Liquors, admitted that she had no prior acquaintance with the men who robbed her (T.E., pp. 34-35), she identified appellant as one of the men who committed the robbery (T.E., p. 10).

Mrs. Sprowles explained on cross-examination that prior to trial she had viewed appellant on two occasions and identified him (T.E., pp. 36-42). She noted that on the first occasion, November 1, 1975, she saw appellant alone in a room at the Lebanon City Police Station after being informed on the telephone that a tall black man had been arrested; at that time she identified appellant as one of the men who had robbed her (T.E., pp. 38-39, 41). The witness also related that she saw appellant again at the preliminary hearing at a later date and once more identified him (T.E., pp. 41-42).

The due process clause of the federal Constitution protects an accused against the admission of evidence derived from suggestive identification procedures. In Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), the Supreme Court held that a defendant could claim that "the confrontation conducted. . .was so unnecessarily suggestive and conductive to irreparable mistaken identification that he was denied due process of law" Id., 88 S.Ct. at 1972.

That Court has also noted:

> [O]nce a witness has picked out the accused at a line-up, he is not likely to go back on his word later on so that in practice the issue of identity may . . .for all practical purposes be determined there and then, before the trial. United States v. Wade, 388 U.S. 218, 229, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

In the case at bar there were two pre-trial identifications of appellant by Mrs. Sprowles, the second reinforcing the first in crystallizing an image of appellant in Mrs. Sprowles' mind. The illegality of these identification procedures which irretrievably branded appellant as Mrs. Sprowles' robber is not disputed; appellant's counsel and the prosecutor stipulated that the procedures were impermissible.

In Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968), the Court of Appeals for the District of Columbia elucidated the proper procedure for a trial judge to follow when the defense challenges the validity of an in-court identification of his client because it has been tainted by an unduly suggestive pretrial identification confrontation:

> Where the prosecution intends to offer only an in-court identification, the defense may challenge its admissibility. The court should then, on facts elicited outside the presence of the jury, rule upon whether a pre-trial identification by the same eyewitness is violative of due process or the right to counsel.
>
> If a violation is found, the court should then decide whether the in-court identification is still admissible because it has an independent source; indeed, it would appear in the interest of expeditious judicial administration for such a ruling to be made in any event. Id., at 1237.

In Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), the Supreme Court said:

> The admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error. Id., 388 U.S. at 272. (emphasis added).

It is established law that"the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law." Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969). If the manner in which the prosecution presented the suspect to the witnesses for pretrial identification is inherently suggestive, the central question then becomes whether under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive.

If the pretrial identification procedure was "unnecessarily" or "impermissibly" suggestive, the trial judge must then proceed to the question whether the pretrial procedure was so "conducive to irreparable mistaken identification" or had such a tendency "to give rise to a very substantial likelihood of irreparable misidentification" that allowing the witness to make an in-court identification would be a denial of due process. United States ex rel Phipps v. Follette, 428 F.2d 912, 915 (2nd Cir. 1970).

In Myers v. Commonwealth, Ky., 499 S.W.2d 277 (1973), this Court recognized the need for a trial judge to conduct a hearing outside the jury's presence to determine if the witness' ability to identify the accused was the product of the improper confrontation:

> If the [witness'] ability to identify appellant was the result of the jail meeting, his testimony on the subject should have been excluded. See People v. Rahming, 26 N.Y.2d 411, 311 N.Y.S.2d 292, 259 N.E.2d 727, (1970). On the other hand, if [his] in-court identification

> was based upon his independent recollection of appellant on the occasion of the crime, his testimony was not necessarily made inadmissible because of the improper jail confrontation. See Sobel, Eye-Witness Identification in Criminal Cases (1966), § 7, page 18. Id., at 280.

In Myers this Court emphasized that the trial judge had conducted a hearing and that procedure was the proper method of resolving this type of issue:

> It was for the court to determine if the in-court identification was tainted. Id.

In Francis v. Commonwealth, Ky., 468 S.W.2d 287 (1971), the defendant's counsel requested a hearing out of the presence of the jury "at which evidence might be heard by the trial judge relating to the circumstances of a police lineup and seeking a determination of whether the police lineup influenced or tainted the in-court identification." Id., at 293. This Court held that the "trial court erred in denying" the defendant's request. Id.

In Francis, supra, this Court relied on the Supreme Court's decision in United States v. Wade, supra, noting that in Wade:

> . . . the accused was not granted a new trial but the judgment was vacated and the case remanded to the state court for a determination of whether the in-court identification was tainted. Francis v. Commonwealth, supra, at 293.

This Court in Francis likewise declined to reverse the judgment and grant a new trial. So, in accordance with procedure delineated in United States v. Wade, this Court granted the following relief:

> Under the authority of Hohnke v. Commonwealth, Ky., 451 S.W.2d 162 (1970) the judgment is vacated and the case is remanded to the circuit court for a determination of the question of whether the in-court identification had a substantial independent basis or was tainted by the pretrial lineup. If there was a

> substantial independent basis for the in-court identification, the trial court will reinstate the judgment, otherwise the appellant shall be granted a new trial.

In the instant case, it was stipulated that the pretrial identification of appellant was inadmissible, yet the trial judge failed to hold an evidentiary hearing on appellant's motion to suppress the in-court identification of appellant by Mrs. Sprowles, the key prosecution witness. The trial judge's failure to conduct a hearing outside the presence of the jury on the defendant's motion to suppress constituted error requiring at the minimum a vacation of appellant's judgment and a remand to the Washington Circuit Court for a limited evidentiary hearing on the issue.

The prejudice from the trial judge's error is manifest. Mrs. Sprowles' identification of appellant was the only evidence which linked appellant to the robbery in any way. Without that evidence, the trial judge would have been required to grant appellant's motion for a direct verdict (TE, p. 59).

Under the circumstances, appellant is clearly entitled to at the minimum a limited evidentiary hearing on the admissibility of Mrs. Sprowles' in-court identification testimony. Accordingly, appellant's conviction should be vacated and the case remanded to Washington Circuit Court for the necessary hearing.

II.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENIED APPELLANT DUE PROCESS OF LAW BY OVERRULING APPELLANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL.

At the close of the prosecution's case, trial defense counsel moved for a directed verdict of acquittal "on the basis that the evidence for the Commonwealth fails to sustain the burden of proof that the defendant, Milton Ray, was in any way involved in the crime which he is being charged today" (T.E., p. 59). The trial court overruled appellant's motion (T.E., p. 59). Appellant submits that the trial court erred in overruling the defense motion for a directed verdict.

It should be noted that the only evidence introduced at trial which even remotely implicated appellant in the alleged robbery was the identification by Mrs. Sprowles of appellant as one of the men who were in the liquor store before Mrs. Sprowles was robbed. Both the prosecutor and defense counsel stipulated that the pretrial procedures by which Mrs. Sprowles identified appellant were illegal (T.E., pp. 2-3). However, no hearing concerning any independent basis for her identification of appellant occurred (See Argument I). Therefore, the identification of appellant at trial by Mrs. Sprowles was clearly tainted by the admittedly illegal previous confrontations with appellant and was inadmissible. Since Mrs. Sprowles' inadmissible identification of appellant was the only evidence connecting him with the offense in question, appellant's motion for a directed verdict should have been granted.

Assuming arguendo that this Court holds the in-court identification of appellant by Mrs. Sprowles to be admissible evidence, appellant's motion for a directed verdict should still have been granted because, according to the evidence, appellant did not personally commit robbery in the first degree in

violation of KRS 515.020 and there was no evidence of his complicity in the offense to make him liable for the conduct of another under the provisions of KRS 502.020(1).

KRS 515.020(1) specifies the elements of robbery in the first degree:

> 515.020. Robbery in the first degree. (1) A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
>
> (a) Causes physical injury to any person who is not a participant in the crime; or
>
> (b) Is armed with a deadly weapon; or
>
> (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

There was no evidence that appellant used or threatened to use physical force upon Mrs. Sprowles with intent to commit a theft; Mrs. Sprowles testified on two occasions during the trial that appellant was not the one who hit her (T.E., pp. 12, 29). She never testified that she was threatened with the use of physical force by anyone.

Since the evidence clearly indicates that appellant himself did not commit robbery in the first degree, he can only be liable for that offense if his actions violated the provisions of KRS 502.020(1). That statute provides:

> 502.020. Liability for conduct of another--Complicity. (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
>
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or

> (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

It should be noted:

> The Penal Code abolishes the common law doctrine of parties to crime which distinguished between principals, aiders and abettors, and accessories before and after the fact, and bases an individual's liability for his own conduct and the conduct of others upon considerations involving the actor's state of mind and his contribution to the commission of a criminal offense. Brickey, Kentucky Criminal Law, § 3.01.

Prior to the enactment of the Penal Code, this Court noted on many occasions that an accomplice "must share the criminal intent or purpose of the principal." Helton v. Commonwealth, Ky., 244 S.W.2d 762, 767 (1951); see Haley v. Commonwealth, Ky., 286 S.W.2d 525, 526 (1956); Hunt v. Commonwealth, Ky., 483 S.W.2d 128, 131 (1972). In order that an accused be liable as an accomplice under KRS 502.020(1), it is necessary that he have the intention of promoting or facilitating the commission of the offense and that he engage in the activities prohibited by KRS 502.020(a), (b), or (c).

It is an axiomatic principle of law that in order to be sufficient to sustain a conviction, the evidence must show beyond a reasonable doubt that the accused committed the act charged, and that he did so under circumstances that every element of the offense existed. Proof of a criminal charge beyond a reasonable doubt is constitutionally required. As Mr. Justice Frankfurter noted in Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 1009, 96 L.Ed. 1302 (1952):

> It is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion - basic in our law and rightly one of the boasts of a free society - is a requirement and a safeguard of due process of law in the historic procedural content of 'due process.'

The Supreme Court emphatically noted in In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970):

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Id., 90 S.Ct. at 1073 (emphasis added).

Turning to the facts and circumstances of the case at bar, Mrs. Sprowles' testimony about the activities of appellant on the day of the robbery is the only evidence that could remotely indicate appellant's complicity in the charged offense. It should be noted that the testimony of the witness arguably established that robbery in the first degree was committed by someone, although not by appellant. After testifying that she was working in Springfield Liquors on the day in question, Mrs. Sprowles related the circumstances of the robbery:

> On September 26, 1975, between twelve-thirty and one, three black men walked into the liquor store. Mr. Ray being the leader. I was sitting there working on orders. I stood up and said, "Hello, how are you". None of them said anything. They walked over to the walk-in box; Mr. Ray took out three half quarts of Budweiser beer; he brings them over and sits them on the counter and pays me for them; he stands right by the cash register; one of the others stands in the middle; and another one stands facing the front. The one in the center turns around and gets a fifteen cent bag of something off the potato chip rack; he pays me and I ring that up. Then Mr. Ray walks around to the end of the counter. I became suspicious, but I felt I had nothing to do, so in a very low voice he asked the fellow standing watching the front if he would like some liquor or something and he said, "I would like some Juicy Fruit gum." The chewing gum is behind me on a shelf. I have to turn around, but being suspicious and watching Mr. Ray at the time, I came back sorta sideways

> and started to lay the gum on the counter and wham! Lights went out; undoubtedly I was spun around. I had a cut on each side of my back. My right side was bruised, my left arm - my right arm was bruised, and I vaguely remember being in a daze. I hear this hustle and bustle, but not knowing what was going on at the time. I also heard them as they ran out, "If you don't lay there ten minutes, we're going to shoot you or we're going to kill you." Undoubtedly, I passed out. (T.E., pp. 6-7).

Clearly, the testimony of the prosecuting witness establishes neither appellant's intention to promote the robbery nor his participation in any activity that would make him liable for the robbery committed by another, both of which must be established under KRS 502.020(1). The Commentary (1974) to KRS 502.020(1) enunciates:

> To be guilty under subsection (1) for a crime committed by another, a defendant must have specifically intended to promote or facilitate the commission of that offense. This means that the statute is not applicable to a person acting with a culpable mental state other than "intentionally."

Certainly, no intention to facilitate a robbery is established by appellant's movements around the store and his brief, innocuous conversation with one of his companions. Appellant is, therefore, not liable under KRS 502.020(1) because there was no evidence of intent which is an essential element of complicity liability.

After delineating the mental element for complicity liability, KRS 502.020(1) describes the types of activities that suffice to make a person responsible for the crime of another (Commentary [1974]). Mrs. Sprowles stated that appellant entered the store, bought some beer, walked around the store, and asked a companion whether he wanted some liquor or something (T.E., pp. 6-7). These activities certainly do not establish that appellant solicited, commanded, or engaged in a conspiracy to commit a robbery in contravention of KRS 502.020(1)(a). KRS 502.020(1)(c) is inapplicable, and

appellant's actions do not indicate that he aided, counseled, or attempted to aid his companions in planning or committing the robbery in violation of KRS 502.020(1)(b). As this Court has noted many times, "mere presence at the scene of a crime is not sufficient, of itself, to constitute one" an accomplice. McQueen v. Commonwealth, Ky., 282 S.W.2d 613 (1965). Appellant's actions prior to the time the robbery was accomplished amounted to no more than "mere presence." The proof at trial in no way established that appellant had the requisite intention to promote a robbery or that he engaged in any of the activities prohibited by the complicity statute. Neither element of KRS 502.020(1) was established in the case at bar; appellant's motion for a directed verdict unquestionably should have been granted.

As the Supreme Court of Pennsylvania noted in Commonwealth v. McFadden, 448 Pa. 146, 202 A.2d 358 (1972), to be an accomplice in the commission of a crime, "one must be an active partner in the intent to commit it." Id., at 360. That same court stated in Commonwealth v. Wilson, 449 Pa. 235, 296 A.2d 719 (1972):

> All theories that are recognized under our law to hold one responsible for the criminal acts of another require the existence of a shared criminal intent. Id., at 721.

Noting that the prosecution in the cited case had failed to produce any evidence that the defendant shared a criminal intent with his friends, the Court reversed the defendant's conviction because of insufficiency of the evidence.

Appellant submits that the evidence of record is as consistent with innocence as with guilt. While a conviction in this Commonwealth may be had on circumstantial evidence, no defendant may be convicted on evidence if it is as consistent with innocence as with guilt. Mere suspicion is not enough. Fugate v. Commonwealth, Ky., 445 S.W.2d 685 (1969);

Thompson v. Commonwealth, Ky., 479 S.W.2d 583 (1972); and Pruitt v. Commonwealth, Ky., 490 S.W.2d 486 (1972).

It is an established principle of law that "where the testimony on behalf of the Commonwealth fails to incriminate the accused, or is wholly insufficient to show guilt," a directed verdict of acquittal should be given. Bradley v. Commonwealth, Ky., 465 S.W.2d 266, 267 (1971); see Moore v. Commonwealth, Ky., 446 S.W.2d 271 (1969); Carmen v. Commonwealth, Ky., 490 S.W.2d 744 (1973).

In view of the nature of the evidence presented at appellant's trial, his conviction must be reversed. Such a conviction is constitutionally impermissible. "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged...violate[s] due process." Harris v. United States. 404 U.S. 1232, 1233, 92 S.Ct. 10, 12, 30 L.Ed.2d 25 (1971); see Vachon v. New Hampshire, 414 U.S. 478, 94 S.Ct. 664, 665, 38 L.Ed.2d 666 (1974). Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624, 1 L.Ed.2d 654 (1960); Johnson v. Florida, 391 U.S. 596, 88 S.Ct. 1713, 20 L.Ed.2d 838 (1968).

The failure of the trial judge to direct a verdict of acquittal in the case at bar was clearly error. The patently illegal pretrial identifications of appellant by Mrs. Sprowles tainted her in-court identification which was the only evidence placing appellant in the area where the robbery incurred. Even disregarding that improper identification of appellant, there was no evidence of liability for complicity under KRS 502.020(1) which was essential since the undisputed testimony established that appellant himself was not guilty of robbery in the first degree. On the basis of the assigned error, appellant's conviction must be reversed.

III.

APPELLANT WAS DENIED DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT BY THE TRIAL COURT'S IMPROPER INSTRUCTION ON THE LAW OF COMPLICITY LIABILITY.

Before appellant's counsel and the prosecutor gave their closing arguments, the trial judge instructed the jury (T.R., pp. 12-13). Apparently, the trial judge utilized a form instruction for robbery in the first degree and attempted to alter it to encompass the theory of complicity liability in the alternative. A copy of this instruction is attached as an Appendix.

Including the judge's interlineations in the body of the instruction, the instruction read:

INSTRUCTION NO. I

> You will find the Defendant guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> 1. That in this County, on or before September 26, 1975, and before the finding of the Indictment herein, he, or persons aiding and assisting him, stole a sum of money from the Springfield Liquor Store;
>
> AND
>
> 2. That in the course of so doing and with intent to accomplish the theft, one of them caused physical injury to Iveta Sprowles by striking her with his hand or fist or some instrument.
>
> If you find the Defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten years nor more than twenty years, in your discretion.

This Court has observed:

> It is axiomatic that it is the duty of the trial court to instruct on all the law in a criminal case....Ray v. Commonwealth, Ky., 284 S.W.2d 76, 78 (1955).

RCr 9.54 also provides, "It shall be the duty of the court to instruct the jury in writing on the law of the case." Indisputably, the court has the obligation to instruct correctly on both the law and the facts of the case.

The necessity for a particular instruction depends on the evidence adduced at trial. Cook v. Commonwealth, 262 Ky. 718, 91 S.W.2d 25, 27 (1936). Prior to the enactment of the Kentucky Penal Code and the abolition of the various categories of accomplices by KRS 502.020, this Court had noted:

> [T]he question of whether an aiding and abetting instruction is authorized at the separate trial of a joint-indictee becomes purely a question of whether the instruction is authorized by the evidence, Murphy v. Commonwealth, Ky., 279 S.W.2d 767 (1955).

Analogously, whether an instruction on complicity liability is warranted under the Penal Code is determined by the facts which are brought out at trial.

In the case at bar, the evidence presented at trial clearly negated the possibility that appellant personally committed robbery in the first degree; the only arguable basis for appellant's liability would be his complicity in a robbery committed by another under KRS 502.020(1). (See Argument II, supra, wherein appellant asserts that the evidence failed to establish even complicity liability and that his motion for a directed verdict of acquittal should have been granted.) Unquestionably, the only theory of the case on which the judge should have instructed was complicity liability, assuming arguendo there was sufficient evidence to support even that theory.

This Court has emphatically stated:

> Where the evidence is conflicting as to whether the accused acted as the principal perpetrator of the crime or as an aider or abettor, it is proper to instruct the jury on both theories.

> But where the evidence conclusively shows that, if the defendant participated in the crime, he did so only as an aider and abettor, the Court should instruct the jury upon that theory alone; and it is error to instruct the jury so as to permit them to find him guilty of participating in the commission of the crime in a manner other than that shown by the evidence. Broughton v. Commonwealth, 303 Ky. 18, 196 S.W.2d 890, 893 (1946); emphasis added.

Examining Instruction No. I given in the case at bar, it is apparent that it is defective in several respects. Initially, it must be observed that the court instructed the jury that it could find appellant guilty as either principal or accomplice, although the evidence only even arguably supported a theory of complicity liability. The jury should not have been instructed that appellant could be liable as a principal.

The attempted alteration of the instruction to encompass the alternative theory of liability for complicity resulted in an erroneous instruction on the law under KRS 502.020(1). In order to be liable for the conduct of another, one must engage in certain proscribed activities with the intention of promoting or facilitating the commission of the offense by the other person. An appropriate instruction in a case such as the instant one would inform the jury that to convict an accused of complicity liability for first degree robbery, it must be established beyond a reasonable doubt that: (1) another person (X) committed robbery in the first degree, (2) the defendant aided, counseled, or attempted to aid X in planning or committing the robbery, and (3) the defendant assisted (X) with the intention of promoting or facilitating the commission of the robbery. See 1 Palmore, Kentucky Instructions to Juries, § 9.13 (1975).

The instruction in the case at bar does not even specify that the jury must determine that a certain person or persons were principals while another or others were accomplices. The jury is told that it may find that the defendant " or persons aiding or assisting him" stole a sum of money and that "one of them caused physical injury" to the prosecuting witness (T.R., p. 12). This is patently erroneous. The jury could find that someone besides appellant both stole the money and injured Mrs. Sprowles and, without finding any of the elements of complicity liability under KRS 502.020(1), find appellant guilty of robbery in the first degree. A proper instruction such as the one set out in the previous paragraph would clearly delineate that in order to find appellant liable for the conduct of a cohort, the jury must find that the cohort committed the offense charged. It must be remembered, of course, that the instruction was erroneous in permitting the jury to find appellant guilty as a principal in any event.

Besides its lack of clarity and error in failing to differentiate between principals and accomplices, the instruction in no way includes the elements of complicity liability. First, it is essential that the instruction include "intention of promoting or facilitating the commission of the offense," KRS 502.020(1). As the Commentary (1974) to the Statute elucidates:

> To be guilty under subsection (1) for a crime committed by another, a defendant must have specifically intended to promote or facilitate the commission of that offense.

Prior to the enactment of the Penal Code, this Court held that an instruction on aiding and abetting that did not include a charge that the defendant must have acted "willfully, maliciously, and feloniously" was erroneous. Riley v. Commonwealth, 269 Ky. 8,106 S.W.2d 85, 86 (1937). Analogously,

an instruction under the Penal Code that does not include a charge that the defendant must have acted with the requisite intent is erroneous. The instruction in the case at bar did not contain a requirement that the jury find appellant had the proscribed intention; it was, therefore, clearly improper.

Next, a proper instruction on complicity liability must inform the jury that the accused in a factual situation such as this one must have aided, counseled, or attempted to aid the principal in planning or committing the robbery. The only reference to such activity in the instruction was the charge that the jury must find appellant or persons aiding or assisting him stole money from the liquor store (T.R., p. 12). There was no charge that the jury must find appellant aided the principal; the instruction was thus fatally defective.

Instruction No. I in the instant case was fatally defective. The trial court both instructed on a theory of the case completely unsupported by the evidence and instructed improperly on the theory of complicity liability. The prejudice to appellant from this erroneous instruction is manifest. Faced with an unclear instruction partially unrelated to the facts developed at trial and misstating the law on liability for the conduct of another, the jury was likely to return a verdict of guilty utilizing improper criteria. Because of the improper instruction in the case at bar, appellant's conviction must be reversed.

Appellant acknowledges that RCr 9.54(2) specifically states that "[n]o party may assign as error . . . the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection."

This position is recognized by the American Bar Association in its work, Standards Relating to Trial by Jury, where § 4.6(c) states:

> No party should be permitted to raise on appeal the failure to give an instruction unless he shall have tendered it, and no party should be permitted to raise on appeal the giving of an instruction unless he objected thereto, stating distinctly the matter to which he objects and the grounds of his objection.

However, Standard 4.6(c) adds the following proviso:

> However, if the interests of justice so require, substantial defects or omissions should not be deemed waived by failure to object to or tender an instruction.

The commentary to this Standard gives the following explanation of this exception:

> It is not unusual to include in statutes or rules on jury instructions some provision on waiver. Generally, the position is that a defendant may not complain on appeal about instructions unless his counsel took sufficient action at trial, either by the tender of instructions or objection to proposed instructions, to apprise the trial judge of his view as to what the instructions should be. Thus, Fed.R.Crim.P.30 reads: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." But, notwithstanding the existence of this provision and similar language in other jurisdictions, it is not strictly correct to say that appeal as to a matter of instructions is absolutely barred by a failure to object or tender the proper instruction. This is because the federal courts and most state courts have taken the position that in a criminal case the trial judge has a responsibility to ensure that certain essential instructions are given. Certain basic instructions, essential to a fair determination of the case by the jury (e.g., burden of proof, elements of offense charged), must be given, and the concepts of waiver will not be employed to bar reversal if a defendant has been convicted in the absence of these instructions.

This Court has also recognized an exception to the doctrine of waiver of trial errors where the error causes "a manifest injustice." See Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970).

Correct instructions on the applicable law are certainly "essential to a fair determination of the case by the jury." It is difficult to imagine anything more crucial to a case than proper jury instructions. The instructions in the case at bar were patently erroneous both with respect to the law and the facts of the case. Under the instructions, the jury was permitted to find appellant guilty without finding he was guilty of the elements of complicity liability; this clearly deprived appellant of his right to due process under the Fourteenth Amendment.

For the reasons delineated above, appellant submits that his conviction must be reversed.

CONCLUSION

For the foregoing reasons, we respectfully request that the judgment of the lower court be reversed.

Respectfully submitted,

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J. Vincent Aprile II

J. VINCENT APRILE II
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A P P E N D I X

INSTRUCTION NO. I

YOU WILL FIND THE DEFENDANT GUILTY UNDER THIS INSTRUCTION IF, AND ONLY IF, YOU BELIEVE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT ALL OF THE FOLLOWING:

1. THAT IN THIS COUNTY, ON OR ABOUT SEPT. 26, 1975, OR PERSONS AIDING AND ASSISTING HIM, AND BEFORE THE FINDING OF THE INDICTMENT HEREIN, HE STOLE A SUM OF MONEY FROM THE SPRINGFIELD LIQUOR STORE;

AND,

2. THAT IN THE COURSE OF SO DOING AND WITH INTENT TO ACCOMPLISH THE THEFT, ONE OF THEM CAUSED PHYSICAL INJURY TO IVETA SPROWLES BY STRIKING HER WITH HIS HAND OR FIST OR SOME INSTRUMENT.

IF YOU FIND THE DEFENDANT GUILTY UNDER THIS INSTRUCTION, YOU WILL FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR NOT LESS THAN TEN YEARS NOR MORE THAN TWENTY YEARS, IN YOUR DISCRETION.

~~FIRST DEGREE ROBBERY~~